

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

MARY S. WEST,

Plaintiff,

vs.

GREG COX, *et al.*,

Defendants.

Case No.: 2:15-cv-00665-GMN-VCF

**ORDER**

Pending before the Court is the Motion to Dismiss, (ECF No. 39), filed by Defendants Dr. Romeo Aranas (“Aranas”), Yolanda Campbell (“Campbell”), Beebe Clark (“Clark”) (incorrectly named as BB Clark), Bob Faulkner (“Faulkner”), and Jo Gentry (“Gentry”) (collectively “Defendants”).<sup>1</sup> Plaintiff Mary S. West (“Plaintiff”) filed a Response, (ECF No. 42), and Defendants filed a Reply, (ECF No. 44). For the following reasons, the Motion to Dismiss is **GRANTED in part** and **DENIED in part**.

**I. BACKGROUND**

This case arises from alleged constitutional violations that occurred while Plaintiff was incarcerated at Florence McClure Women’s Correctional Center (“FMWCC”) in Las Vegas, Nevada. (Second Am. Compl. (“SAC”) ¶ 8, ECF No. 30). Plaintiff alleges she suffered or continues to suffer from the following medical conditions: (1) injuries to her right shoulder; (2) injuries to her left wrist; and (3) growths on her forehead and hands. (*Id.* ¶¶ 7–57). Plaintiff states six counts of Eighth Amendment violations against Defendants for deliberate indifference to her conditions. (*Id.* ¶¶ 59, 64, 67, 72, 75, 79).

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<sup>1</sup> Defendants Dr. Francisco Sanchez and Dr. Richard Wulff filed Joinders, (ECF Nos. 41, 49), to the Motion to Dismiss.

1           **A.     Right Shoulder**

2           In her Second Amended Complaint (“SAC”), Plaintiff alleges to have injured her right  
3 shoulder while performing her prison job assignment on August 14, 2013. (*Id.* ¶ 17). Dr. James  
4 Holmes (“Holmes”), a Nevada Department of Corrections (“NDOC”) medical doctor,  
5 examined Plaintiff. (*Id.* ¶¶ 10, 18). Holmes prescribed Plaintiff Tylenol and admitted her to an  
6 infirmary cell. (*Id.* ¶ 19). Approximately one week later, Holmes x-rayed Plaintiff’s shoulder,  
7 confirming multiple fractures. (*Id.* ¶ 20). Holmes prescribed more Tylenol, a sling, an ace  
8 wrap, and released Plaintiff from the infirmary. (*Id.* ¶ 21).

9           In September of 2013, Defendant Dr. Richard Wulff (“Wulff”) saw Plaintiff for her  
10 shoulder and recommended she continue ibuprofen for pain. (*Id.* ¶ 21). In November of 2013,  
11 Wulff saw Plaintiff again and allegedly determined that the fractures had healed. (*Id.* ¶ 25). In  
12 February of 2014, Wulff saw Plaintiff and allegedly told her he could not treat her without a  
13 specific referral from NDOC. (*Id.* ¶ 26).

14           In August of 2014, Plaintiff alleges that she complained to medical staff of extreme  
15 shoulder pain, believing she had reinjured her shoulder. (*Id.* ¶ 27). On August 21, 2014,  
16 Defendant Dr. Francisco Sanchez (“Sanchez”) ordered an x-ray report of Plaintiff’s shoulder,  
17 which allegedly revealed a deformity caused by improper healing of the original fracture. (*Id.*  
18 ¶ 28). Sanchez treated Plaintiff with an injection, more pain medication, and ordered a follow-  
19 up. (*Id.* ¶ 30).

20           On March 19, 2015, Plaintiff alleges that Wulff examined her and recommended an  
21 MRI. (*Id.* ¶ 35). Sanchez requested approval for the MRI on March 24, 2015, which the  
22 Utilization Review Panel (“URP”) approved on March 31, 2015. (*Id.* ¶ 36). On April 17, 2015,  
23 Plaintiff received an MRI that she alleges indicated various tears and injuries in her right  
24 shoulder. (*Id.* ¶ 38). Further, Plaintiff alleges that, based on the MRI results, Wulff diagnosed  
25

1 her with a torn labral and a coracoacromial tear and recommended surgery on May 8, 2015. (*Id.*  
2 ¶ 39). On June 15, 2015, Wulff performed surgery on Plaintiff's shoulder. (*Id.* ¶ 40).

3 Plaintiff alleges that throughout this time, she submitted kites and grievances regarding  
4 her treatment and requested that family members phone prison officials with respect to her  
5 shoulder and wrist injuries. (*Id.* ¶¶ 23, 32). Plaintiff alleges that Aranas, Gentry, Clark, and  
6 Faulkner routinely denied these grievances. (*Id.* ¶¶ 23, 32, 37). On September 2, 2014,  
7 Faulkner allegedly warned Plaintiff to stop having people call the office regarding her shoulder  
8 and wrist. (*Id.* ¶¶ 33–34).

### 9 **B. Left Wrist**

10 Plaintiff alleges she injured her left wrist on June 1, 2014. (*Id.* ¶ 43). A fracture was  
11 confirmed and the URP approved surgery on June 3, 2014. (*Id.*). Plaintiff alleges that on June  
12 30, 2014, Faulkner falsely informed her that her case had not been reviewed by the URP, when  
13 it had. (*Id.* ¶ 45). On July 14, 2014, Campbell allegedly falsely informed Plaintiff that the  
14 surgical approval process had not been completed. (*Id.* ¶ 46). On September 5, 2014, Plaintiff  
15 alleges that Gentry falsely notified her that no surgery had been recommended on her wrist. (*Id.*  
16 ¶ 47). On October 13, 2014, Clark allegedly informed Plaintiff that her surgery had been  
17 rescheduled without explaining why. (*Id.* ¶ 48). On November 16, 2014, Faulkner allegedly  
18 informed Plaintiff that her surgery had been rescheduled due to “overly exaggerated” breach of  
19 security reasons. (*Id.* ¶¶ 49, 75). During this time, Defendants Aranas, Gentry, Clark, and  
20 Faulkner allegedly ignored Plaintiff's kites and grievances inquiring about her pending wrist  
21 surgery. (*Id.* ¶ 44). On November 12, 2014, Plaintiff alleges that Holmes performed surgery on  
22 her wrist. (*Id.* ¶ 51).

### 23 **C. Forehead and Hand Growths**

24 In June of 2014, Plaintiff submitted kites complaining of growths on her forehead and  
25 hands. (*Id.* ¶ 53). Sanchez examined the growths and determined that they were not of concern

1 and did not require treatment. (Motion to Dismiss (“MTD”) 13:11–13:13, ECF No. 39). Clark  
2 allegedly suggested that Plaintiff cover the growths on her forehead with bangs. (SAC ¶ 54).  
3 Plaintiff alleges that her private physician is currently treating the growths with prednisone  
4 injections and Plaintiff is awaiting a biopsy. (*Id.* ¶ 56).

## 5 **II. LEGAL STANDARD**

6 Dismissal is appropriate under Rule 12(b)(6) where a pleader fails to state a claim upon  
7 which relief can be granted. Fed. R. Civ. P. 12(b)(6); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544,  
8 555 (2007). A pleading must give fair notice of a legally cognizable claim and the grounds on  
9 which it rests, and although a court must take all factual allegations as true, legal conclusions  
10 couched as factual allegations are insufficient. *Twombly*, 550 U.S. at 555. Accordingly, Rule  
11 12(b)(6) requires “more than labels and conclusions, and a formulaic recitation of the elements  
12 of a cause of action will not do.” *Id.* “To survive a motion to dismiss, a complaint must contain  
13 sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its  
14 face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). “A  
15 claim has facial plausibility when the plaintiff pleads factual content that allows the court to  
16 draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* This  
17 standard “asks for more than a sheer possibility that a defendant has acted unlawfully.” *Id.*

18 If the court grants a motion to dismiss for failure to state a claim, leave to amend should  
19 be granted unless it is clear that the deficiencies of the complaint cannot be cured by  
20 amendment. *DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992). Pursuant  
21 to Rule 15(a), the court should “freely” give leave to amend “when justice so requires,” and in  
22 the absence of a reason such as “undue delay, bad faith or dilatory motive on the part of the  
23 movant, repeated failure to cure deficiencies by amendments previously allowed, undue  
24 prejudice to the opposing party by virtue of allowance of the amendment, futility of the  
25 amendment, etc.” *Foman v. Davis*, 371 U.S. 178, 182 (1962).

1 **III. DISCUSSION**

2 In the instant Motion, Plaintiff alleges six counts of Eighth Amendment deliberate  
3 indifference violations. (SAC ¶¶ 58–62, 63–65, 66–70, 71–73, 74–77, 78–80). Defendants  
4 move to dismiss: (1) Counts II and IV as alleged against Aranas, Campbell, Clark, Gentry, and  
5 Faulkner and Count III as alleged against Sanchez and Wulff regarding Plaintiff’s shoulder; (2)  
6 Count V as alleged against Aranas, Campbell, Clark, Faulkner, Gentry, Sanchez, and Wulff  
7 regarding Plaintiff’s wrist; and (3) Count VI as alleged against Clark and Sanchez regarding  
8 Plaintiff’s growths. (MTD 4:6–10:3). Plaintiff asserts that each defendant acted under color of  
9 law and is thereby liable under 42 U.S.C. § 1983. (SAC ¶¶ 5, 8–16). Defendants argue that  
10 they are entitled to qualified immunity on all claims. (MTD 10:4–11:18). The Court addresses  
11 each request in turn.<sup>2</sup>

12 **A. Shoulder Injury**

13 Count II and IV allege that Aranas, Campbell, Clark, Gentry, and Faulkner failed to  
14 investigate the alleged treatment delay, denied Plaintiff’s grievances, falsely informed her of  
15 the status of her treatment, and that Faulkner requested that calls from family members cease.  
16 (SAC ¶¶ 64, 72). Plaintiff alleges that this resulted in delayed diagnosis and surgery, prolonged  
17 pain, and deformity. (*Id.* ¶¶ 65, 73). Count III alleges Sanchez and Wulff delayed seeking an  
18 MRI after Plaintiff’s complaint of further damage to her shoulder, resulting in a ten-month  
19 delay of surgery after re-injury. (*Id.* ¶¶ 66–70). The Court begins by addressing Counts II and  
20 IV against Aranas, Campbell, Clark, Gentry, and Faulkner, followed by Count III against  
21 Sanchez and Wulff.

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25 <sup>2</sup> Count I is alleged in its entirety against Holmes, who is not a party to this Motion. Thus, the Court does not address this count.

1                   i.       ***Counts II and IV as alleged against Defendants Aranas, Campbell, Clark,***  
2                               ***Gentry and Faulkner***

3           Counts II and IV assert that Aranas, Campbell, Clark, Gentry, and Faulkner delayed  
4 diagnosis and surgery by denying Plaintiff's grievances, providing her with false information,  
5 and requesting that calls from family cease. (SAC ¶¶ 63–65, 71–73). Each of these allegations  
6 fails to establish liability because "[l]iability under § 1983 attaches only upon personal  
7 participation by a defendant in the constitutional violation." *Taylor v. List*, 880 F.2d 1040, 1045  
8 (9th Cir. 1989).

9           First, the SAC fails to show how, simply by denying Plaintiff's grievances, Aranas,  
10 Campbell, Clark, Gentry, or Faulkner personally participated in preventing, delaying, or in any  
11 way affecting Plaintiff's treatment. To the contrary, the SAC indicates that Plaintiff received  
12 regular examinations and that once Wulff recommended surgery, he performed it promptly. (*Id.*  
13 ¶¶ 24–26, 28, 30, 35–36, 39–40). Moreover, this Court has held that the denial of grievances  
14 alone is insufficient to establish personal participation for a § 1983 claim. *See May v. Williams*,  
15 No. 2:10-cv-00576-GMN-LRL, 2012 WL 1155390, at \*3 (D. Nev. Apr. 4, 2012). Therefore,  
16 the denial of grievances fails to establish these Defendants' personal participation in the alleged  
17 violation. *See Stewart v. Warner*, No. C15-5243 RBL-KLS, 2016 WL 1104893, at \*5 (W.D.  
18 Wash. Feb. 29, 2016), *report and recommendation adopted*, No. C15-5243 RBL-KLS, 2016  
19 WL 1089974 (W.D. Wash. Mar. 21, 2016) (holding that nurses who had reviewed and denied  
20 Plaintiff's grievances did not personally participate in alleged Eighth Amendment violations  
21 because they did not have decision-making authority over Plaintiff's care).

22           Second, Plaintiff's claim that Aranas, Campbell, Clark, Gentry, and Faulkner "fed her  
23 false information" fails to allege a nexus between the false statements and the delay in  
24 diagnosis or surgery. (SAC ¶ 72). This claim therefore fails to establish these Defendants'  
25 personal participation in the alleged violation. *See Taylor*, 880 F.2d at 1045. Finally, Plaintiff's

1 allegation that Faulkner warned her to stop having family members call on her behalf is not  
2 actionable because even had the SAC alleged that Faulkner succeeded in stopping these calls, it  
3 would not show how this would have delayed her diagnosis or surgery. Thus, the claim fails to  
4 establish Faulkner's personal participation in the delay. *See id.* Because Counts II and IV fail  
5 to allege the personal participation necessary for a colorable Eighth Amendment cruel and  
6 unusual punishment claim, they are dismissed without prejudice.

7 **ii. Count III as alleged against Defendants Sanchez and Wulff**

8 Count III seeks to hold Defendants Sanchez and Wulff liable for their delay in seeking  
9 an MRI and diagnosing Plaintiff's fractures, resulting in a ten-month delay in surgery. (SAC  
10 ¶ 70). The Eighth Amendment's prohibition against cruel and unusual punishment requires  
11 states to provide medical care to prisoners because they cannot secure medical care for  
12 themselves. *See Estelle v. Gamble*, 429 U.S. 97, 103 (1976). A prisoner asserting an Eighth  
13 Amendment claim for denial of medical care must show "acts or omissions sufficiently harmful  
14 to evidence deliberate indifference to serious medical needs." *Estelle*, 429 U.S. at 106. There is  
15 both an objective and a subjective component to an Eighth Amendment violation. *LeMaire v.*  
16 *Maass*, 12 F.3d 1444, 1451 (9th Cir. 1993).

17 The first, objective, prong of the deliberate indifference standard requires that an alleged  
18 deprivation be sufficiently serious. *Hudson v. McMillian*, 503 U.S. 1, 8–9 (1992). "Because  
19 society does not expect that prisoners will have unqualified access to health care, deliberate  
20 indifference to medical needs amounts to an Eighth Amendment violation only if those needs  
21 are 'serious.'" *Id.* at 9. "The existence of an injury that a reasonable doctor or patient would  
22 find important and worthy of comment or treatment; the presence of a medical condition that  
23 significantly affects an individual's daily activities; or the existence of chronic and substantial  
24 pain are examples of indications that prison has a 'serious' need for medical treatment."

1 *McGuckin v. Smith*, 974 F.2d 1050, 1059–60 (9th Cir. 1992), *overruled on other grounds by*,  
2 *WMX Tech, Inc. v. Miller*, 104 F.3d 1133 (9th Cir. 1997).

3 The second, subjective, prong of the test requires a plaintiff to show that the defendant’s  
4 response to the need was deliberately indifferent. *See id.* at 1060. A plaintiff may satisfy the  
5 second prong by demonstrating that (1) the prison official engaged in a purposeful act or failure  
6 to respond to a prisoner’s pain or possible medical need, and (2) harm caused by the  
7 indifference. *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006). “A prisoner need not show  
8 harm was substantial; however, such would provide additional support for the inmate’s claim  
9 that the defendant was deliberately indifferent to his needs.” *Id.* However, “a complaint that a  
10 physician has been negligent in diagnosing or treating a medical condition does not state a valid  
11 claim of medical mistreatment under the Eighth Amendment. It does not become a  
12 constitutional violation merely because the victim is a prisoner.” *Estelle*, 429 U.S. at 106. To  
13 state a claim for deliberate indifference arising from a delay in treatment, a prisoner must allege  
14 that the delay was harmful, although an allegation of substantial harm is not required.  
15 *McGuckin*, 974 F.2d at 1060.

16 Here, Count III satisfies the first prong of the test by alleging the existence of chronic  
17 and substantial pain, (SAC ¶ 68), yet fails the second prong of the test, because Plaintiff does  
18 not allege a purposeful act or failure to respond to her pain. To the contrary, the SAC alleges  
19 that Defendants Sanchez and Wulff monitored and cared for her shoulder injury, following a  
20 conservative course of treatment. (*Id.* ¶¶ 24–26, 28, 30, 35–36, 39–40). Moreover, once  
21 recommended, Defendants performed the MRI and surgery promptly. (*Id.* ¶¶ 39–40). In short,  
22 the SAC alleges a disagreement over treatment between a prisoner and the prison medical staff  
23 that does not rise to the level of deliberate indifference. *Cf. Ortiz v. City of Imperial*, 884 F.2d  
24 1312 (9th Cir. 1989) (finding deliberate indifference where police knew of prisoner’s condition  
25 and totally failed to treat it competently). At most, Plaintiff alleges malpractice. *See Wood v.*



1 *Housewright*, 900 F.2d 1332, 1334 (9th Cir. 1990) (“While poor medical treatment will at a  
2 certain point rise to the level of constitutional violation, mere malpractice, or even gross  
3 negligence, does not suffice.”). Thus, Count III as alleged against Defendants Sanchez and  
4 Wulff is dismissed without prejudice.

5 **B. Wrist Injury**

6 Defendants move to dismiss Count V as alleged against Defendants Aranas, Campbell,  
7 Clark, Faulkner, Gentry, Sanchez, and Wulff for intentionally delaying surgery on Plaintiff’s  
8 wrist. (MTD 9:5–9:15). The Court begins by addressing the allegations against Aranas,  
9 Sanchez, and Wulff, followed by the allegations against Campbell, Clark, Faulkner, and  
10 Gentry.

11 **i. *Count V as alleged against Defendants Aranas, Sanchez, and Wulff***

12 Plaintiff alleges that Defendants Aranas, Sanchez, and Wulff were responsible for the  
13 delay in her wrist surgery. (SAC ¶¶ 50, 52, 75). However, she fails to point to any specific  
14 action or inaction which would demonstrate that Aranas, Sanchez, and Wulff personally  
15 participated in the alleged denial of rights. Unlike the allegations against Campbell, Clark,  
16 Faulkner, and Gentry (*Id.* ¶¶ 45–49), Plaintiff does not allege that Aranas, Sanchez, or Wulff  
17 personally participated in the delay of surgery. Plaintiff merely alleges that she submitted kites  
18 and grievances to Aranas and that Sanchez and Wulff were aware of her fractures. (*Id.* ¶¶ 44,  
19 50, 75).

20 As discussed *supra*, Aranas’ denial of grievances, without more, is not enough to  
21 establish an Eighth Amendment violation. *See May*, 2012 WL 1155390, at \*3. Additionally,  
22 although Sanchez and Wulff may have been aware of Plaintiff’s need for surgery, Plaintiff does  
23 not allege they were involved in scheduling her surgery, and therefore fails to allege their  
24 personal participation in its delay. Because liability under § 1983 attaches only upon personal  
25 participation by a defendant in the constitutional violation, Count V as alleged against

1 Defendants Aranas, Sanchez, and Wulff is dismissed without prejudice. *See Taylor*, 880 F.2d at  
2 1045.

3 **ii. *Count V as alleged against Defendants Campbell, Clark, Faulkner, and***  
4 ***Gentry***

5 Defendants move to dismiss Count V as alleged against Defendants Campbell, Clark,  
6 Faulkner, and Gentry. (MTD 9:5–9:15). With regard to these Defendants, however, Plaintiff’s  
7 allegations fulfill both the objective and the subjective prong of the deliberate indifference test  
8 discussed *supra*. *See Jett*, 493 F.3d at 1096. Plaintiff does not allege that these Defendants  
9 simply denied her grievances, but that they deliberately delayed surgery the URP had approved,  
10 causing her to linger in pain. (SAC ¶¶ 43–52, 74–77). This allegation fulfills the objective  
11 prong requirement of a serious medical need because it asserts chronic, substantial pain and a  
12 reasonable doctor’s determination of the injury as worthy of comment and treatment. *See*  
13 *Egberto v. Nev. Dep’t of Corr.*, 678 F. App’x 500, 502–03 (9th Cir. 2017) (holding an inmate’s  
14 chronic back pain to be a serious medical need because doctors found it worthy of comment  
15 and treatment).

16 Plaintiff establishes the subjective prong because she alleges that Campbell, Clark,  
17 Faulkner, and Gentry acted purposefully in delaying her surgery. (SAC ¶¶ 45–50). Plaintiff  
18 alleges that Faulkner, Campbell, and Gentry falsely informed her that her case had not been  
19 reviewed, approved, or even recommended, when it had. (*Id.* ¶¶ 45–75). Plaintiff also alleges  
20 that Faulkner and Clark notified her that surgery had been rescheduled without explanation and  
21 for “overly exaggerated breach of security reasons.” (*Id.* ¶¶ 48–49, 75). Accepting these  
22 allegations as true, Plaintiff sufficiently alleges purposeful acts on the part of Campbell, Clark,  
23 Faulkner, and Gentry, causing harm in the form of approximately five months of prolonged  
24 pain. (*Id.* ¶¶ 43–52, 74–77). Accordingly, Defendants’ Motion to Dismiss Count V as alleged  
25 against Campbell, Clark, Faulkner, and Gentry is denied.

1           **C.     Growths**

2           Count VI seeks to hold Defendants Sanchez and Clark liable for deliberate indifference  
3 with regard to their alleged failure to treat Plaintiff’s growths on her hands and forehead. (SAC  
4 ¶¶ 78–80). This claim fails on the first, objective prong of the deliberate indifference test,  
5 discussed *supra*. See *Jett*, 493 F.3d at 1096. Count VI does not allege a sufficiently serious  
6 injury, or any injury at all. Plaintiff simply states that she noticed growths on her forehead and  
7 hands, but fails to allege that they caused her pain or affected her daily activities. Although she  
8 contends that her private physician found the growths to be worthy of investigation, (SAC  
9 ¶ 56), at most this establishes a difference of medical opinion, which is not cognizable as an  
10 Eighth Amendment violation. See *Sanchez v. Vild*, 891 F.2d 240, 242 (9th Cir. 1989).

11           As for Plaintiff’s allegations against Clark, the SAC merely alleges that Clark suggested  
12 Plaintiff cover the growths with bangs. (SAC ¶ 54). Once again, “[p]risoners can establish an  
13 eighth amendment violation with respect to *medical care* if they can prove there has been  
14 deliberate indifference to their serious medical needs.” *Hunt v. Dental Dept.*, 865 F.2d 198, 200  
15 (9th Cir. 1989) (emphasis added). This is an example of a cosmetic suggestion, not medical  
16 care, and is insufficient to establish liability under the Eighth Amendment. Therefore, Count  
17 VI as alleged against Defendants Sanchez and Clark is dismissed without prejudice.

18           **D.     Qualified Immunity**

19           Defendants contend that they are entitled to qualified immunity on all claims. (MTD  
20 10:4–11:18). Under the doctrine of qualified immunity, “government officials performing  
21 discretionary functions generally are shielded from liability for civil damages insofar as their  
22 conduct does not violate clearly established statutory or constitutional rights of which a  
23 reasonable person would have known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The  
24 qualified immunity doctrine protects defendants not just from ultimate liability, but from  
25 having to litigate at all. *Saucier v. Katz*, 533 U.S. 194, 200 (2001).

1 In analyzing a claim of qualified immunity, a court must examine: (1) whether the facts  
2 as alleged, taken in the light most favorable to plaintiff, show that the defendant's conduct  
3 violated a constitutional right; and (2) if a constitutional right was violated, whether, "in light of  
4 the specific context of the case," the constitutional right was so clearly established that a  
5 reasonable official would understand that what he or she was doing violated that right. *Saucier*,  
6 533 U.S. at 201–02; *see also Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (holding that the  
7 contours of the constitutional right violated must be sufficiently clear). If no constitutional  
8 right was violated, the inquiry ends and the defendant prevails. *Saucier*, 533 U.S. at 201.

9 Defendants Campbell, Clark, Faulkner, and Gentry are not entitled to qualified  
10 immunity for Plaintiff's Eighth Amendment deliberate indifference claims. First, as set forth  
11 more fully above, the facts alleged in Count V of the SAC are sufficient to establish that  
12 Defendants violated a constitutional right when they denied, delayed, or intentionally interfered  
13 with Plaintiff's medical treatment. *See Hunt*, 865 F.2d at 201. Second, the constitutional right  
14 was clearly established such that a reasonable prison official would have known that continued  
15 delay of surgery constituted unlawful deliberate indifference. "It is settled law that deliberate  
16 indifference to serious medical needs of prisoners violates the Eighth Amendment." *Jackson v.*  
17 *McIntosh*, F.3d 330, 332 (9th Cir. 1996) (holding prison officials' delay of an inmate's kidney  
18 transplant to be a clearly established constitutional violation).

19 Defendant's argument that Plaintiff failed to identify which clearly established law each  
20 Defendant had violated is unconvincing. (MTD 10:5–11:18). "For a right to be clearly  
21 established it is not necessary that the very action in question have previously been held  
22 unlawful . . . To define the law in question too narrowly would be to allow defendants to define  
23 away all potential claims." *Jackson*, 90 F.3d at 332. Thus, Defendants Campbell, Clark,  
24 Faulkner, and Gentry are not entitled to qualified immunity on Count V.

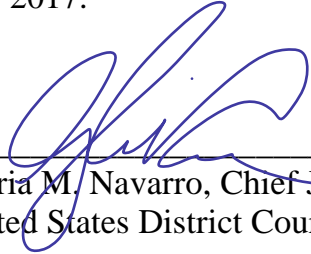
1 Because the Court has dismissed Counts II, III, IV, and VI, a qualified immunity  
2 analysis is unnecessary regarding these claims. However, because the Court has dismissed  
3 each claim without prejudice, the analysis may become necessary should Plaintiff amend the  
4 SAC to state cognizable Eighth Amendment claims.

5 **IV. CONCLUSION**

6 **IT IS HEREBY ORDERED** that the Motion to Dismiss, (ECF No. 39), is **GRANTED**  
7 **in part** and **DENIED in part**. The following causes of action are **DISMISSED without**  
8 **prejudice**: Count II; Count III; Count VI; Count V as alleged against Aranas, Sanchez, and  
9 Wulff; and Count IV. The Motion to Dismiss the following cause of action is **DENIED**: Count  
10 V as alleged against Campbell, Clark, Faulkner, and Gentry.

11 **IT IS FURTHER ORDERED** that Plaintiff shall have twenty-one (21) days from the  
12 filing date of this Order to file a third amended complaint. Failure to file a third amended  
13 complaint by this date shall result in the dismissal of Plaintiff's claims with prejudice.

14 **DATED** this 8 day of August, 2017.

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18 Gloria M. Navarro, Chief Judge  
19 United States District Court  
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